STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CRIMINAL DIVISION
Docket Nos. 3814-10-16 Cncr
3798-10-16 Cncr

State of Vermont

v.

Stephen Bourgoin,
Defendant

DECISION AND ORDER:
MOTION FOR A JUDGMENT OF ACQUITTAL,
OR IN THE ALTERNATIVE, A NEW TRIAL

On June 28, 2019, Defendant Stephen Bourgoin, through counsel Robert W. Katims, Esq. and Sara Puls, Esq., filed motions seeking a judgment of acquittal pursuant to V.R.Cr.P. 29(c), or in the alternative, a new trial pursuant to V.R.Cr.P. 33. The State, through State's Attorney Sarah George, Esq. and Deputy State's Attorney Susan Hardin, Esq., filed its response on July 19, 2019. For the reasons stated herein, the Court denies Defendant's motions.

I: Introduction

As stated in Rule 47, "[u]nless otherwise required by these rules, oral argument shall be deemed waived unless requested by an interested party or required by the court. In any case, the court may dispose of the motion without argument." V.R.Cr.P. 47(b)(2). Further, "the court can ... refuse to grant a hearing where evidence is unnecessary to the disposition of the motion." Reporter's Notes—1982 Amendment, V.R.Cr.P. 47. Thus, even where requested, the Court may decide in its discretion whether to hold an evidentiary hearing on a motion for a new trial. *State v. Mayo*, 2008 VT 2, ¶ 26, 183 Vt. 113. "'[W]hen requested, an evidentiary hearing should be granted on a [Rule] 33 motion for new trial based on newly discovered evidence, if the grounds relied upon are stated with particularity, and the motion is neither frivolous nor totally lacking in merit.'" *State v. Wetter*, 2011 VT 111, ¶ 25, 190 Vt. 476 (quoting *State v. Unwin*, 142 Vt. 562, 565 (1983)).

Here, neither party requested oral argument on the Rule 29 and 33 motions, thus the Court finds that the matter has been waived. Further, an evidentiary hearing was not requested, and the Court finds that the resolution of the pending motions may be made without further hearing. The taking of additional evidence is unnecessary for all but the Rule 33 motion alleging new evidence. The Court considers Defendant's motions based on the argument contained in his filings and the evidence adduced at trial. Further, Defendant's motion for a new trial based on new evidence is frivolous, as even if proven, the alleged evidence would not state a basis for granting Defendant's motion. See *infra* part III.D.

II: Rule 29 Motions

A: Applicable Standard

Defendant moves for a judgment of acquittal in accordance with V.R.Cr.P. 29(c). In "[r]eviewing a motion for judgment of acquittal, the test is whether 'the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt.'" *State v. Hammond*, 2012 VT 48, ¶ 14, 192 Vt. 48. "The court should enter a judgment of acquittal only if the State fails to offer 'any evidence to substantiate a jury verdict.'" *Id.* (quoting *State v. Couture*, 169 Vt. 222, 226 (1999)). "Credibility questions raised by the evidence at trial are 'entirely within the province of the jury.'" *Id.* (quoting *State v. Hinchliffe*, 2009 VT 111, ¶ 22, 186 Vt. 487).

Defendant challenges Vermont's iteration of the Rule 29 standard for its reference to the exclusion of modifying evidence. He states that Vermont is unique in asserting this requirement. He further argues that if this standard is read to exclude the evidence submitted as a part of the defense case as to insanity, it violates due process. The Court disagrees as to both counts.

Modifying evidence is "exculpatory evidence introduced by defendant, such as countervailing testimony." *State v. Stolte*, 2012 VT 12, ¶ 10, 191 Vt. 600 (internal quotation marks and citations omitted; emphasis removed). "[T]he exclusion of modifying evidence is meant to avoid judicial decisions on credibility only when live witnesses or affidavits are presented," a holding which "confirms the definition of modifying evidence in our prior cases as defense testimony introduced to meet and dispute the State's evidence." *Id.* ¶ 12. Thus, when considering whether a piece of evidence is "modifying," "the true inquiry is whether the ... evidence raises a factual dispute more appropriate for the jury to determine." *State v. Breer*, 2016 VT 120, ¶ 11, 203 Vt. 649.

Though Defendant contends this standard is unique in Vermont, the principle, if not the term applied to it, is commonplace. This understanding of the Rule 29 analysis is consistent with federal practice. See *United States v. Payne*, 591 F.3d 46, 59–60 (2d Cir. 2010), *cert. denied* 562 U.S. 950 (2010) ("Assessments of witness credibility and choices between competing inferences lie solely within the province of the jury. '[W]here there are conflicts in the testimony, we must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses ....'" (quoting *United States v. Miller,* 116 F.3d 641, 676 (2d Cir. 1997), *cert. denied,* 524 U.S. 905 (1998)); *United States v. Gu*, No. 2:16-CR-00084-1, 2018 WL 671227, at *4 (D. Vt. Feb. 1, 2018) ("Arguments that the jury should have discredited evidence ask the court to consider modifying evidence, which is not permissible under Fed. R. Crim. P. 29." (citing *Payne*)). Indeed, the Vermont Supreme Court has stated that "*State v. Gibney* offers this Court's fullest discussion of the meaning of modifying evidence" and that "*Gibney* drew its definition from two federal cases." *Stolte*, 2012 VT 12, ¶¶ 10–11.

As to the consideration of defense evidence presented concerning the insanity defense, Defendant is correct that this Court must consider evidence presented by the defense in analyzing the Rule 29 motions. See *State v. Fanger*, 164 Vt. 48, 52 (1995) ("[T]he trial court must make its ruling based on all the evidence before it, whether produced by the State or the defendant.").

However, "*Fanger* did not suggest that the trial court utilize the modifying evidence to make a credibility determination between whose version of the events was the more believable." *State v. Turnbaugh*, 174 Vt. 532, 534 (2002). Thus, the Court will consider Defendant's insanity defense evidence to the extent that it does not constitute modifying evidence. Yet, to the extent the insanity defense evidence calls for the Court to weigh the credibility of Defendant's experts versus the State's experts, such a determination is inappropriate in a Rule 29 motion. See *United States v. Bohle*, 475 F.2d 872, 874 (2d Cir. 1973) ("The alleged shortcomings in this doctor's testimony as compared to that of the various defense witnesses were at most matters of weight and credibility for the jury, whose role is to resolve 'battles of experts' testifying as to insanity.").

Defendant's argument concerning due process appears to be limited to a situation wherein the Court excluded defense evidence concerning the insanity defense in its entirety. Defendant has failed to articulate how the above analysis, which does not wholly exclude the insanity defense evidence he presented, denies him due process of law. This Court will not address constitutional claims "where they are insufficiently raised and inadequately briefed." *State v. Brillon*, 2010 VT 25, ¶ 5, 187 Vt. 444.

B: Substantive Analysis

Defendant challenges the State's evidence as to the mental state element of second-degree murder charged in this matter, wanton disregard of the likelihood that death or great bodily harm would result, and that of the grossly negligent operation and aggravated operation without the owner's consent charges, which Defendant identifies as criminal negligence. Defendant also challenges the State's rebuttal evidence to his insanity defense. The Court addresses each element in turn.

1: Wanton Disregard

The mental state element charged in the second-degree murder counts was "in causing the death of each individual, Mr. Bourgoin acted with a wanton disregard of the likelihood that death or great bodily harm would result." *Jury Instructions* at 9. The Vermont Supreme Court has defined "wantonness" in this context as

> "extremely reckless conduct that disregards the *probable* consequences of taking human life." *State v. Shabazz*, 169 Vt. 448, 455...(1999). To be convicted of second-degree murder based upon wanton conduct, there must be evidence that the defendant was aware of the deadly risk posed to human life from his or her actions.

State v. Baird, 2017 VT 78, ¶ 13, 205 Vt. 364. The Court has further explicated the dual nature of this element:

> The difference between the implied intent to kill ("depraved heart") required for second-degree murder, and the criminally negligent conduct for involuntary manslaughter, is the defendant's awareness of the risk and the degree of that risk. To be convicted of second-degree murder, the defendant must subjectively be aware of the deadly risk to the victim. See *People v. Dellinger*, 49 Cal.3d 1212,

1217, 783 P.2d 200, 202–03, 264 Cal. Rptr. 841, 844 (1989) (defendant's conviction of second-degree murder based on implied malice required a finding that he "'*actually appreciated* the risk [to human life] involved, i.e., a *subjective* standard' ") (quoting *People v. Watson,* 30 Cal.3d 290, 296–97, 637 P.2d 279, 283, 179 Cal. Rptr. 43, 47 (1981) (emphasis in original)); *State v. Fontana,* 680 P.2d 1042, 1047 (Utah 1984) (second-degree murder conviction under "depraved indifference" provision of criminal code required State to prove that the defendant knew that his conduct created grave risk of death to another). On the other hand, defendant need not be actually aware of the risk to the victim to be guilty of involuntary manslaughter. *State v. Stanislaw,* 153 Vt. 517, 525, 573 A.2d 286, 291 (1990). The test is an objective one, focusing on what a reasonable person would appreciate the risk to be under all the facts and circumstances. *Id.*

In addition, for second-degree murder, the extent of risk must be something more than that required for criminal negligence. The actual risk required for criminal negligence is greater than the negligence standard of care in a civil case. *State v. Beayon,* 158 Vt. 133, ----, 605 A.2d 527, 528 (1992); *Stanislaw,* 153 Vt. at 525, 573 A.2d at 291. For second-degree murder, however, "the degree of risk of death or serious bodily injury must be more than a mere unreasonable risk, more even than a high degree of risk." 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.4, at 200 (1986); see *State v. Dunbar,* 117 Wash.2d 587, 594, 817 P.2d 1360, 1363 (1991) ("depraved mind" murder requires an "extreme form of recklessness which sets the crime apart from first degree manslaughter"); cf. *State v. Crocker,* 435 A.2d 58, 67 (Me. 1981) (although depraved-indifference murder and criminal negligence both have an objective mental element, the former is distinguished by requiring a very high degree of risk that death will result).

State v. Brunell, 159 Vt. 1, 7–8 (1992).

Defendant does not appear to contest that driving the wrong way on a busy Interstate highway at high speeds in and of itself constitutes the kind of "extreme form of recklessness" creating "a very high degree of risk that death will result." Rather, Defendant's motion challenges the sufficiency of the State's evidence as to the first element: Defendant's subjective awareness of this extreme risk. Defendant argues that the State (1) failed to prove Defendant knew he was driving the wrong way on the highway, and (2) failed to rebut his evidence of insanity, which established a diminished capacity incapable of subjective awareness.

The State produced sufficient circumstantial evidence of Defendant's subjective awareness that he was driving the wrong way on the highway. Uncontested eyewitness testimony established that Defendant first entered upon the highway driving in the correct direction, and then stopped and turned around, after which he began driving the wrong way up the highway. He passed numerous drivers—all driving the correct direction—who signaled to him by flashing their lights and honking their horns. Though circumstantial, this evidence, viewed in the light most favorable to the State, fairly and reasonably tends to convince a

reasonable trier of fact that Defendant was subjectively aware that he was driving the wrong way beyond a reasonable doubt. *State v. Cole*, 150 Vt. 453, 456 (1988) ("Intent is rarely proved by direct evidence; it must be inferred from a person's acts and proved by circumstantial evidence."); see *State v. Derouchie*, 140 Vt. 437, 444 (1981) ("The proper focus of judicial review should be the quality and strength of the evidence, whether direct or circumstantial."). As noted by Defendant in his motion, the State was not required to establish his motive for driving the wrong way; they were only legally required to establish his subjective awareness of the same. Cf. *State v. Pray*, 130 Vt. 613, 616 (1972) (discussing a first-degree murder charge, stating "[a] 'motiveless' crime, that is to say, a crime committed entirely without cause or reason, is suggestive of irrationality, and the 'motivelessness' may be evidence supporting an insanity defense. But failure to prove, i.e. establish as a proven fact by the requisite measure of proof, a motive is not the same thing as establishing the crime as 'motiveless.' The prosecutor may be content to establish deliberation, malice, premeditation and rationality by other proof.").

Defendant's experts' testimony as to his insanity at the time of the offense was contradicted by the State's expert, who opined that Defendant was sane at the time, meaning Defendant was aware of the wrongful nature of his conduct and able to conform his conduct to the requirements of the law. As noted above, the Court may not engage in weighing the credibility of the various experts in this matter in deciding a Rule 29 motion. See *Bohle*, 475 F.2d at 874. The State also produced testimony from several lay and expert witnesses who interacted with Defendant just before and after the offense who testified as to his mental state, behavior, and awareness at those times. This evidence, when viewed in the light most favorable to the State, supports the State's circumstantial evidence of awareness.

Further, considering Defendant's statements to the experts,[1] as Defendant claims in his brief, "he was aware he was driving, *but* believe[d] he was driving in this 'mission.'" Mot. at 11.

---

[1] Defendant did not testify in this matter, as was his right; nonetheless, many statements made by him to the various experts were stated on the record for the jury without objection. "If the testimony is received without objection, the testimony becomes part of the evidence in the case and is usable as proof to the extent of its rational persuasive power." 1 McCormick On Evid. §§ 52, 54 (7th ed.) ("Accordingly, the general approach is that a failure to make a specific objection at the time the evidence is proffered, is a waiver for appeal of any ground of complaint against its admission."); see *Gregoire v. Ins. Co. of N. Am.*, 128 Vt. 255, 259–60 (1969) (considering the unobjected-to admission of hearsay and holding that "[a]ll of this evidence came into the case without challenge either by objection or motion to strike. Consequently, the evidence was properly for consideration by the jury.") (cited in McCormick).

Defendant's statements were assumedly not objected to because such statements are admissible under V.R.E. 703. As explained by the Vermont Supreme Court:

> Under Rule 703, if an expert relies on the out-of-court statements of another in forming his or her opinion *and* if such statements are of a type reasonably relied on by experts in the particular field, then the statements—even if not independently admissible for their substance—will be admissible for the limited purpose of demonstrating the basis for the expert's opinion.

State v. Recor, 150 Vt. 40, 48 (1988). However, "expert use of otherwise inadmissible evidence as a basis for opinion does not make the evidence suddenly admissible for the inadmissible purpose." *Id.* This means that, had an objection been raised, Defendant's statements would have been admitted for the limited purpose of demonstrating

This does not contradict the State's evidence of subjective awareness. As Defendant indicates in his motion,

> [f]or example, when a defendant claims that due to a mental disease he believed that he was squeezing lemons, when in fact he was strangling his victim, the State's burden of proving the specific intent element of murder would require the State to prove that, in fact, the defendant knew he was strangling a person. In such a case, the defendant could not be required to prove the existence of the mental state he alleges. On the other hand, a defendant may claim that a mental disease caused him to believe that his homicidal act was commanded by God. Such a mental state would not disprove the existence of a specific intent to kill, and so the defendant may be required to prove that he suffered from such a delusion.

State v. Messier, 145 Vt. 622, 628 n.* (1985). Defendant's case resembles the latter example. Driving the wrong way on the highway because Defendant believed he was on a mission and therefore had to do so does not "disprove the existence of" a subjective awareness that he was driving the wrong way on the highway. Thus, viewing the evidence in the light most favorable to the State, Defendant's evidence does not serve to negate this element of intent.

The Court denies Defendant's motion for acquittal as to the second-degree murder charges on the basis of the failure of the State to produce sufficient evidence to support the element of wanton disregard.

2: Criminal Negligence

Defendant's Rule 29 motion as to criminal negligence[2] mirrors the arguments made with respect to the element of wanton disregard. First, the mental state element for the crime of

---

the basis for the experts' opinions, not for their truth. See Reporter's Notes, V.R.E. 703. But given the lack of objection, the Court considers these statements as substantive evidence in analyzing Defendant's motions. See McCormick, *supra*, § 54.

[2] Defendant misstates the intent element of aggravated operation of a vehicle without the owner's consent as being criminal negligence; the intent element for that crime is that Defendant "knowingly" operated the vehicle without the owner's consent. The element of "knowingly" is significantly different from the element of criminal negligence such that the Court cannot assume that Defendant' intended to raise an argument as to this element. See *State v. Blish*, 172 Vt. 265, 273 (2001) (noting the Vermont Supreme Court's "recognition that knowing or voluntary action involves a higher degree of culpability than reckless or negligent behavior, and reckless action invokes lesser criminal liability than knowing action"). As Defendant does not raise an argument concerning the State's evidence as to the element of "knowingly," he has waived any argument as to that element. Cf. *State v. Faham*, 2011 VT 55, ¶ 17, 190 Vt. 524 (holding that where defendant raises one argument in post-trial Rule 29 motion for acquittal, but not another, the unraised argument is waived on appeal).

However, even if he did so, the Court would deny his motion as the State produced sufficient evidence, when viewed in the light most favorable to the State, to convince a reasonable jury beyond a reasonable doubt that Defendant knew that he did not have consent to operate the Williston police cruiser, specifically (1) that Defendant turned away from Officer Shepard as he ran past him down the embankment, then Defendant made a sharp turn and ran straight into the vehicle from which the officer had emerged; (2) that the vehicle was a marked police cruiser with its blue lights activated; (3) that Defendant managed to turn off the cruiser's blue lights without activating any

grossly negligent operation of a vehicle is gross negligence, not criminal negligence. The Court assumes this was a clerical error and interprets Defendant's argument to concern the element of gross negligence.

> 23 V.S.A. § 1091(b)(2) defines gross negligence as "a gross deviation from the care that a reasonable person would have exercised in that situation." Negligence and gross negligence are distinguished only by degree: negligence is a failure to "exercise ordinary care," gross negligence is "a failure to exercise even a slight degree of care."

State v. Cameron, 2016 VT 134, ¶ 6, 204 Vt. 52. The Court went on to explain that

> [o]ur cases make clear that a conviction for grossly negligent operation cannot rest solely on "a mere error in judgment, loss of presence of mind, or momentary inattention." *State v. Free*, 170 Vt. 605, 607... (2000) (mem.). But our cases make equally clear that a jury may convict for grossly negligent operation when momentary inattention co-occurs with an elevated risk of danger.

Id. ¶ 7. The Vermont Supreme Court has also "long recognized that we must look to the individual facts of a given case to determine if gross negligence is present, and in doing so we defer to the jury's findings." *State v. Neisner*, 2010 VT 112, ¶ 23, 189 Vt. 160 (considering motion for acquittal).

The evidence, when viewed in the light most favorable to the State, established that Defendant, after stealing a police cruiser, drove slowly through the crime scene, avoiding debris and bystanders, then proceeded down the southbound highway at approximately the speed limit until he observed a police cruiser blocking the highway at the Richmond exit, at which point he pulled over. After a few seconds, he pulled back onto the highway going northbound again in the southbound passing lane. He drove at increasing speed past multiple vehicles, including another police cruiser, finally reaching over 100 miles per hour and hitting the remains of his truck at the scene of the original accident. This evidence would support a jury finding beyond a reasonable doubt that Defendant's failure to perceive that driving at over 100 miles per hour into

---

of the other buttons on the crowded and complex control panel, indicating his awareness of what the control panel was, the function of its controls, and his ability to read the buttons and process their function; and (4) that Defendant pulled over when he saw a police cruiser blocking I-89 near the Richmond exit, then turned around and drove at a high rate of speed in the opposite direction. Viewed in the light most favorable to the State, this evidence supports an inference that Defendant was aware of the officer's arrival at the scene, his desire not to be identified by the officer, and his immediate decision to take the officer's clearly-marked vehicle once the officer was down the embankment without seeking permission to do so, and his consciousness of the wrongfulness of his actions.

As noted *supra* in part II.B.1, Defendant's evidence in support of his insanity defense requires the Court to resolve a credibility determination between the State's and the defense's experts, which is not appropriate on a Rule 29 motion. The State's evidence, including lay and expert testimony in the days and hours prior to and after the offense, when viewed in the light most favorable to the State, supports finding that the State met its burden as to the element of "knowingly."

Finally, also as explained *supra* in part II.B.1, Defendant's statements concerning his mental state at the time and his belief that he was participating in a government test or mission do not negate the State's evidence as to his having taken the cruiser "knowingly."

a crowded accident scene—already littered with debris and crowded with people, at least one of whom Defendant had previously spoken to—involved a gross deviation from the standard of care that a reasonable person would have exercised in the same situation. See *Cameron*, 2016 VT 134, ¶¶ 8–10 (affirming denial of Rule 29 motion for acquittal where State's evidence supported finding that defendant was driving at inappropriately high speed in the wrong lane approaching a dangerous blind corner).

As noted *supra* in part II.B.1, Defendant's evidence in support of his insanity defense requires the Court to resolve a credibility determination between the State's and the defense's experts, which is not appropriate on a Rule 29 motion. The State's evidence, including lay and expert testimony in the days and hours prior to and after the offense, when viewed in the light most favorable to the State, support finding that the State met its burden as to the element of gross negligence.

Finally, also as explained *supra* in part II.B.1, Defendant's statements concerning his mental state at the time and his belief that he was participating in a government test or mission do not negate the State's evidence as to gross negligence.

The Court denies Defendant's motion for acquittal on the basis that the State failed to produce sufficient evidence to prove the element of gross negligence.

3: Failure to Rebut Insanity Defense

Defendant's final contention under Rule 29 is that the defense evidence established the insanity defense by a preponderance, and that the State did not sufficiently rebut that evidence. As a result, he argues, the Court must enter a judgment of acquittal.

Defendant states as the legal basis for his argument the fact that "[t]he trial court must determine the question of entrapment as a matter of law when there is no dispute as to the facts and the inferences to be drawn from them." *State v. Hayes*, 170 Vt. 618, 619–20 (2000). He then states that his motion for judgment of acquittal should be granted because the State failed to adequately rebut his defense. This is a significantly different argument than one that there is no dispute as to the facts and the inferences to be drawn from them; thus, the holding in *Hayes* is of dubious relevance. The Court further fails to perceive the relevance of the U.S. Supreme Court case cited by Defendant, as it concerned an entirely different issue: "whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." *Burks v. United States*, 437 U.S. 1, 5 (1978).

Given the evidence presented at trial, at which the central facts of the insanity defense were hotly contested, the appropriate standard is the Rule 29 standard articulated in Part A. See *State v. Lovejoy*, 150 Vt. 130, 131 (1988) (denying defendant's appeal claiming the evidence at trial did not support a finding of guilt beyond a reasonable doubt since he proved entrapment by a preponderance of the evidence and applying Rule 29 standard). Further, other courts which have considered motions similar to Defendant's have stated that

> when insanity is raised as a defense to crime, a judgment of acquittal by reason thereof, we have emphasized, should be granted only in exceptional cases. And 'in view of the complicated nature of the decision to be made—intertwining moral,

> legal, and medical judgments—it will require an unusually strong showing to induce us to reverse a conviction because the judge left the critical issue of criminal responsibility with the jury.'

Gaskins v. United States, 410 F.2d 987, 990–91 (D.C. Cir. 1967) (quoting *King v. United States*, 372 F.2d 383, 389 (D.C. Ct. App. 1966)) (footnotes omitted). Indeed, the U.S. Supreme Court in *Burks* quoted this same language from *King* in noting the high bar Defendant must overcome. See *Burks*, 437 U.S. at 17 n.11. There, the Supreme Court noted that "[w]hen the basic issue before the appellate court concerns the sufficiency of the Government's proof of a defendant's sanity (as it did here), a reviewing court should be most wary of disturbing the jury verdict." *Id.*

The thrust of Defendant's argument concerns the inadequacies of the State's expert's testimony. However, Defendant's own expert, Dr. Kapoor, stated that this was a close case, in that there was evidence supporting both finding him legally insane and sane at the time of the offense. She also testified on cross-examination that she had been unaware of certain facts which undermined the corroborating evidence supporting her finding of insanity, such as the prevalence in the national news of the issue of "clown scares." Moreover, Defendant's experts disagreed as to which mental disease Defendant suffered from at the time of the offense, a fact which, when viewed in the light most favorable to the State, undermined the weight to be given either diagnosis. Finally, though the State's expert wrote a draft opinion finding that Defendant was suffering from delusions and had an acute psychotic disorder, he also testified that it was his practice to write two versions of his report and consider them together before ultimately rendering his final opinion, which in this case was that Defendant was not suffering from a mental disease or defect within the meaning of Vermont's insanity statute.

Indeed, the jury may have found that Defendant's statements to the experts were not supported by the credible evidence. The experts' opinions, based primarily on those statements, may have been significantly undercut by the State's skillful attack on the veracity of Defendant's statements. For example, the evidence viewed in the light most favorable to the State establishes that (1) Defendant's cell phone records did not corroborate his claims to the experts that he was driving around erratically following signs and signals from his phone and radio for days prior to the offense; (2) the cell phone records, search history, and computer forensic evidence supported an inference that Defendant was primarily concerned with his financial difficulties and not focused solely on a mission for the government as claimed; (3) Defendant's work colleagues and best friend did not characterize his behavior in the days prior to the offense as being noticeably unusual; and (4) Defendant's Facebook account showed him engaged in a banal conversation with an old friend from school during the period when he told the experts he was crawling through a field on a mission from the government. "In short the jury may have taken issue not so much with the psychiatrists' reasoning as with the factual premise." *King*, 372 F.2d at 389.

Further, the ultimate decision as to Defendant's sanity did not necessarily hinge on any one expert's opinion; it was up to the jury to weigh all the evidence, including lay and expert testimony concerning Defendant's behavior in the days and hours prior to and after the offense, and decide (1) whether this amounted to evidence of a mental disease, and (2) that as a result of that mental disease, either Defendant was unable to appreciate the criminality of his conduct, or he was unable to conform his conduct to the requirements of the law. 13 V.S.A. § 4801(a)(1). Viewed in the light most favorable to the State, the lay witness who interacted with Defendant

just moments after the offense noted nothing unusual in his speech other than the fact that he had probably been involved in the accident, and stated that Defendant was responsive to his question. The medical providers who interacted with Defendant at UVM the morning before the accident noted no delusional behavior, and Defendant denied having any delusions. The doctors who treated Defendant after the accident at UVM noted no delusional behavior on the part of Defendant, despite looking for the same.

Viewing all of this evidence in the light most favorable to the State, the Court finds that a reasonable jury could have rejected Defendant's insanity defense outright and found him responsible for his actions beyond a reasonable doubt. As the court stated in *King*, "[a]lthough the testimony in support of the insanity defense was impressive, we conclude that it was not sufficient 'to compel a reasonable juror to entertain a reasonable doubt concerning the accused's responsibility,' and hence not sufficient to require the judge to direct a verdict of not guilty by reason of insanity." 372 F.2d at 387; see *Lovejoy*, 150 Vt. at 131 ("Based on the officer's testimony, there was substantial and credible evidence on which the trial court could have concluded that defendant was not entrapped, and therefore guilty of driving while under the influence of intoxicating liquor.").

Viewing the evidence in the light most favorable to the State, a reasonable jury could also have found that the State's evidence sufficiently rebutted Defendant's evidence of insanity and that he did not prove his defense by a preponderance of the evidence. The preponderance-of-the-evidence "standard is satisfied '[w]hen the equilibrium of proof is destroyed, and the beam inclines toward him who has the burden, however slightly .... A bare preponderance is sufficient, though the scales drop but a feather's weight.'" *In re M.L.*, 2010 VT 5, ¶ 25, 187 Vt. 291 (quoting *Livanovitch v. Livanovitch,* 99 Vt. 327, 328 (1926)). As stated above, the evidence produced by the State was sufficient to drop the scales in the direction of the State and not the defense, and to negate Defendant's evidence supporting the insanity defense.

Under either circumstance, taking the evidence in the light most favorable to the State and excluding modifying evidence, a reasonable jury would be justified in finding Defendant guilty beyond a reasonable doubt, and that he did not meet his burden as to the insanity defense by a preponderance of the evidence. The Court denies Defendant's motion for acquittal on the basis that the State failed to rebut his evidence supporting a defense of insanity.

III: Rule 33 Motions

Defendant also seeks a new trial pursuant to Vermont Rule of Criminal Procedure 33. Defendant argues that the verdict is clearly against the weight of the evidence and represents a miscarriage of justice. Defendant further argues that the Court erred in not granting Defendant's motion for a mistrial for the State's alleged discovery violation concerning the testimony of Anila Lawrence, and he contests several evidentiary rulings of the Court. In addition, Defendant cites new evidence concerning the credibility of the expert witnesses in this case. Moreover, Defendant alleges error in the jury instruction on diminished capacity. Further, Defendant contends that he was denied his right to a unanimous verdict by twelve impartial jurors. Finally, Defendant argues that the Court's post-trial meeting with the jury entitles him to a new trial.

The court may, on motion of the defendant, grant a new trial if required in the interests of justice. V.R.Cr.P. 33. A Rule 33 motion may be made on evidentiary grounds. "The basic difference [between this motion and a motion pursuant to Rule 29] is that the motion under Rule 29 raises the question whether the prosecution has presented an adequate case, whereas the motion under Rule 33 raises the question whether the jury has correctly performed its function of evaluating admittedly adequate evidence." Reporter's Notes, V.R.Cr.P. 33. "A Rule 33 motion made on evidentiary grounds should be granted 'only upon a conclusion by the trial court that, weighing all the evidence including the credibility of witnesses, the verdict is clearly against the weight of the evidence.'" *State v. Turner*, 2003 VT 73, ¶ 11, 175 Vt. 595 (quoting Reporter's Notes, V.R.Cr.P. 33). "Other grounds for a new trial motion are those recognized by prior law: misconduct affecting the jury; misconduct of counsel or the court; newly discovered evidence; and generally any error that would lead to reversal on appeal, such as the absence of a witness, mistake or surprise, objections to jurors, exclusion and admission of evidence, instructions to the jury, and the like." Reporter's Notes, V.R.Cr.P. 33. "The grant of a new trial is a remedy used sparingly and only in exceptional circumstances." *Turner*, 2003 VT 73, ¶ 11 (citing *State v. Trombly,* 148 Vt. 293, 297 (1987)).

The Court addresses each of Defendant's motions in turn.

A: Weight of the Evidence

Defendant argues that a new trial must be granted on evidentiary grounds. In reviewing the evidence when considering such a motion, "the judge does not sit merely as a thirteenth juror, but applies a stricter standard." *State v. Ladabouche*, 146 Vt. 279, 283 (1985). "[A] new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *Id.* at 285.

Weighing all of the evidence at trial, including the credibility of the witnesses, this Court cannot conclude that the evidence preponderates heavily against the verdict. The Court begins with the evidence supporting the charges of second-degree murder.

1: Second Degree Murder

Defendant stands convicted of five counts of second-degree murder resulting from the collision of his Toyota Tacoma with the Volkswagon Jetta containing the five decedents. As stated in the jury instructions given in this matter, the elements of second-degree murder are that (1) Defendant, (2) caused the death of each of the five individuals charged in the Information, (3) that the killing was unlawful, meaning without legal excuse or justification, and (4) that in causing the death of each individual, Defendant acted with a wanton disregard of the likelihood that death or great bodily harm would result. Jury Instructions at 8–9.

The clear weight of the evidence supports finding that Defendant entered the interstate near 11:45 p.m. on October 8, 2016, driving the correct direction, and then stopped, performed a K-turn, and proceeded to drive the wrong way northbound in the southbound passing lane; that he passed several cars who noted his high rate of speed, who had to veer to the right to get out of his way, and who flashed their lights and honked their horns at him to notify him that he was

driving the wrong way; and that he eventually hit a Volkswagon Jetta containing the five decedents. DNA evidence from the airbag in Defendant's Toyota Tacoma collected from the scene of the accident established Defendant's presence in the driver's seat at the time the air bag deployed. Keith Porter, an eyewitness who arrived on the scene shortly after the accident, interacted with Defendant at the scene. Defendant spoke with Mr. Porter, who thought Defendant had been involved in the accident, and told Mr. Porter "I don't know what happened, I just lost control." Expert testimony from Sergeant Owen Ballinger and Michael Sorenson concerning the accident opined that, in the seconds before the impact, Defendant veered from the passing lane into the travel lane, while accelerating up to approximately 90 mph and without applying the brakes, and that he jerked the wheel hard to the right and applied the brakes seconds before the impact. Defendant's vehicle was traveling at approximately 78 mph at the time of impact; the Jetta was opined to be traveling, based on the expert's calculations, at approximately 33 mph. The State Medical Examiner, Elizabeth Bundock, testified that the decedents all died as a result of homicide from blunt trauma related to the impact with Defendant's vehicle.

This evidence is sufficient to establish the first three enumerated elements of the crime as listed in the jury instructions: the identity of the perpetrator as Defendant, that he caused the death of each decedent, and that the killing was unlawful. It is also sufficient to establish the fourth element of "wanton disregard." Circumstantial evidence supports finding that Defendant was actually aware of the risk of death or great bodily harm, and that he ignored that risk. First, Defendant turned around after entering the highway in the correct direction. Second, he passed multiple cars traveling in the correct direction who veered to the right to get out of his way as he approached, and several drivers signaled to him with flashing lights and honking horns, indicating to a reasonable driver that he is traveling in the incorrect direction. Finally, after the collision, Defendant stated to Keith Porter, "I don't know what happened, I just lost control," which suggests that Defendant was oriented to the present moment enough to communicate with Mr. Porter, that he had been conscious at the time of the accident, and subjectively aware of the situation he was in. Objectively, traveling at high rates of speed while driving the wrong way on a busy interstate highway creates a very significant risk of death or serious bodily harm. Together, this evidence established that Defendant was actually aware of his situation, that the situation created a very significant risk of death or serious bodily harm, and that Defendant's continued driving the wrong way on I-89S demonstrated that he consciously ignored the risk.

The Court does not find the evidence concerning diminished capacity preponderates heavily against this finding. Diminished capacity is "'a mental disability of the defendant at the time of the alleged commission of the offense which precludes or prevents the defendant from forming a specific intent or having the required state of mind which is an essential element of the offense.'" *State v. Bruno*, 2012 VT 79, ¶ 42, 192 Vt. 515 (quoting *State v. Wheelock,* 158 Vt. 302, 311 (1992)). "Diminished capacity and insanity are related concepts pertaining to the defendant's state of mind at the time of the offense"; however, "[i]nsanity is an affirmative defense" while evidence of diminished capacity "is an attempt to defeat the State's obligation to show the necessary intent to commit the crime." *State v. Webster*, 2017 VT 98, ¶ 20, 206 Vt. 178, *reargument denied* (Nov. 17, 2017).

Evidence concerning Defendant's mental disability established at the time of the offense that Defendant was suffering from some condition, but no expert agreed on the exact condition—possibly bipolar disorder, possibly a personality disorder, or possibly an adjustment disorder.

Dr. Cotton's diagnosis, that Defendant suffered from an adjustment disorder which did not amount to a mental disease for the purposes of the insanity defense, was consistent with Defendant's past diagnoses by health professionals.

Though Dr. Rosmarin and Dr. Kapoor found Defendant to be suffering from delusions, and the testing performed by Dr. Baronowski indicated that Defendant was not malingering, Dr. Cotton, who interviewed Defendant nearest in time to the event, disagreed. He testified that there was a difference between delusional thoughts and a delusional disorder. Dr. Cotton opined that it would be commonplace for a person, after experiencing an accident such as that involved in this case and coming upon a burning vehicle containing four dead individuals, to process that sight as "mannequins," as Defendant stated he did. Dr. Cotton concluded that this incident, which was one of the clearest memories Defendant had of the event, was indicative of an acute single thought and not a mental disease or defect. Dr. Cotton was credible as to this aspect of his testimony.

Dr. Baranowski testified generally as to the tests and testing methods she performed on Defendant, and as to the results of those tests, which indicated that Defendant had borderline personality disorder ("BPD") with paranoid features or traits and was not malingering. However, her testimony was not developed as to the details of the tests themselves and how or why they indicated such a result. On cross, Dr. Baranowski indicated that someone with this diagnosis can become psychotic and in emotional dis-control, but that someone with BPD can also become rageful and disinhibited. She gave no opinion as to his mental state at the time of the offense.

Dr. Kapoor testified that she found Defendant's story about the days leading up to and including the accident compelling, and believes that he was suffering from delusions, hallucinations, and ideas of reference as a result of an acute psychotic episode that was born from his personality disorder. She believes that as a result of this mental disease, Defendant was unable to reason the way a normal person would, and thus he was unable to appreciate the wrongfulness of his conduct and conform his actions to the requirements of the law. However, Dr. Kapoor acknowledged that there was credible evidence to support the alternative theory—that Defendant was not insane at the time of the offense and that his story of pursuing a government mission was not true.

Further, even accepting Defendant's statements as to his mental state, as noted in part II.B.1, it's not clear that this evidence negates the State's circumstantial evidence of intent. Defendant's story is that he was driving at the direction of signals received through his radio, not that he was unaware of where he was driving. He stated to the experts that he recalled driving. This evidence does not contradict the State's evidence that Defendant was aware that he was driving the wrong way on the highway and chose to ignore it. Driving the wrong way on a busy highway at the direction of the government does not negate the subjective awareness of the objective risk. See *Messier*, 145 Vt. at 628 n.*.

Indeed, the Defense's expert opinions relied heavily on Defendant's statements to the experts. There was significant evidence undermining the credibility of Defendant's assertions. The cell phone record evidence offered by the defense showed that Defendant was not driving to different locations without rational purpose or reason and in response to signs and signals he was

receiving through his phone and the car radio in the days leading up to the accident, which is what he had told the experts. In fact, Defendant appeared to engage in a regular pattern of travel from Sunday through Friday morning, including attending a chiropractor appointment on Thursday. Dr. Kapoor noted that his attendance at the chiropractor appointment weighed against finding him insane. Additionally, records recovered from Defendant's computer, iPad, and cell phone use showed that Defendant was looking at his budget and other financial information, and was receiving calls from financial institutions; there was no evidence of bizarre research, though the witnesses noted the limitations of their investigations and that it would not recover any searches done on his cell phone. Defendant's Facebook history showed that when he claimed to have been crawling through a field on a government mission, he engaged in a conversation with a person he knew from high school about the attractiveness of this person's Facebook friends and his success in Hollywood.

Further, the testimony of individuals who saw him prior to the accident support finding that he was not operating under a diminished capacity at the time of the offense. Defendant's closest friend, Alen Kosebic, who saw Defendant early on the morning of the accident, stated that Defendant was upset about his daughter and was worried about his finances, never mentioned any government mission, and did not seem otherwise delusional. Defendant's co-workers who saw him the day before the accident stated that he was not acting abnormally, and that any concerns he expressed related to his financial difficulties, and his difficulties with Ms. Lawrence and visiting his daughter. When Ms. Fabian called Defendant to see why he did not return to work Friday afternoon, Defendant did not mention a government mission or otherwise sound delusional, he simply stated that his stomach was bothering him and he needed to find a job that paid more. The medical providers at UVM who saw Defendant on the morning of the accident testified that Defendant did not seem delusional or psychotic at the time they saw him, and that he did not mention anything about a government mission. Defendant appeared to engage in normal conversation in the video footage from the ER waiting room. Though both Ms. Fabian and UVM personnel testified to Defendant staring at information posted on the walls, this alone did not raise concern for these witnesses.

In addition, the testimony of the individuals who met with Defendant after the accident support finding that Defendant was not operating under a diminished capacity at the time of the offense. Keith Porter spoke with Defendant, and Defendant had a brief conversation with him in which Defendant's response indicated his awareness of the situation and of his involvement in the accident, and his presence of mind. The doctors who treated Defendant in the days and weeks after the accident noted no delusional thoughts or psychosis. Defendant's experts testified that a delusional person would not necessarily reveal those delusions to others; however, Dr. Kennedy and other medical experts testified as to their training in identifying patients experiencing delusions even when those patients do not admit to experiencing delusions, and they stated that they saw no evidence of delusional behavior on the part of Defendant when they saw him just before or after the offense.

All of this suggests that Defendant was not delusional, but was rather upset about the legitimate stressors in his life, including his lack of visitation with his daughter, his financial difficulties, his frustrations in his personal relationships, and his lack of advancement in his career. It also serves to undermine the basis for the expert opinions that he was insane at the time of the offense, which relied on the credibility of Defendant's story. Viewing all of the

evidence presented, the Court cannot find that it preponderates heavily against the verdict, which found that Defendant was actually aware of the risk of death or great bodily harm, and that he ignored that risk.

Considering this same evidence as to Defendant's insanity defense, the Court again cannot find that it preponderates heavily against the verdict. 13 V.S.A. § 4801 defines the insanity defense in Vermont as follows:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacks adequate capacity either to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law.

13 V.S.A. § 4801(a)(1). This requires proof as to two separate prongs: first, that Defendant suffered from a mental disease or defect at the time of the offense, and second that as a result of the mental disease or defect, either he was unable to appreciate the criminality of his conduct, or he was unable to conform his conduct to the requirements of the law. Jury Instructions at 10. "Insanity is an affirmative defense; when a defendant claims that he or she was insane at the time of the offense, the burden is on the defendant to establish insanity by a preponderance of the evidence." *Webster*, 2017 VT 98, ¶ 20.

Defendant's case on the issue of insanity does not in itself preponderate heavily against the verdict. Defendant's evidence of insanity is the same as that cited above concerning diminished capacity. Defendant's two experts in forensic psychology could not agree on the first prong of the insanity defense to the extent that they disagreed as to what mental disease Defendant suffered from, and the State's expert opined that the condition he suffered from was not a mental disease within the meaning of the law. As to the second prong, Dr. Kapoor stated that there was evidence on both sides of the issue, and though she concluded that Defendant was insane within the meaning of Vermont's statute, that was not the only conclusion to be reached from the available evidence.

In addition, the State put on a substantial and compelling rebuttal case. The State's expert concluded that Defendant was not insane at the time of the offense and could appreciate the criminality of his conduct and conform his conduct to the requirements of the law. Further, the State produced significant evidence undermining the reliability of Defendant's statements to the experts on which they based their opinions, which in turn undermines the reliability of the experts' opinions. This evidence combined with the lay and expert witness testimony concerning the absence of delusional behavior on the part of Defendant in the days prior to and days and weeks after the accident weighs in support of the verdict. As a result, the Court cannot find that the evidence as to the insanity defense preponderates heavily against the verdict or that the verdict otherwise represents a serious miscarriage of justice.

Defendant's motion for a new trial pursuant to Rule 33 arguing that the verdict is against the weight of the evidence as to the five counts of second-degree murder is denied.

2: Grossly Negligent Operation

The grossly negligent operation count concerns not the first accident, but the second, in which Defendant was alleged to have stolen a Williston police cruiser, which he drove southbound away from the scene until he pulled over, turned around, and drove it back to the scene, causing a second collision with the wreckage of his truck. The elements of grossly negligent operation of a vehicle are that (1) Defendant, (2) operated a motor vehicle, (3) that the operation occurred on a public highway, and (4) that Defendant operated his vehicle in a grossly negligent manner, which means in a manner involving a gross deviation from the care that a reasonably prudent person would have exercised under the same or similar circumstances. Jury Instructions at 15.

The evidence produced as to the first element is that Officer Shepard in fact witnessed Defendant be ejected from the driver's seat of the police cruiser as it flew through the air after hitting the truck. Officer Shepard knew Defendant from prior law enforcement encounters and identified him both at the scene and in the courtroom. He also identified Defendant while being ejected as wearing an orange sweatshirt and identified Defendant in his cruiser's video as wearing the same sweatshirt.

The evidence produced as to the second element includes Officer Shepard's and other's testimony as to the Williston police cruiser being driven on I-89. Officer Shepard in particular testified to seeing his cruiser drive away from the scene, and then come back along the highway towards the scene at what he estimated to be 100 mph, traveling in a straight path and without swerving, and hitting the wreckage of Defendant's truck near the middle of the highway. The cruiser camera video footage was also introduced into evidence, which showed the cruiser being operated during the offense.

The evidence produced as to the third element includes Officer Shepard's uncontroverted testimony that Interstate 89 is a public highway.

The evidence produced as to the fourth element includes the testimony and video footage from Officer Shepard's cruiser which showed Defendant driving slowly southbound through the crime scene, avoiding debris and bystanders, and then proceeding down the southbound highway at approximately the speed limit. The video demonstrated that while driving, Defendant turned off the cruiser's blue lights. Testimony from Officer Shepard established that to do this, Defendant would have had to consider the complicated center console panel with a toggle and seventeen buttons. The records from the cruiser show that no buttons were pushed besides the one to turn off the blue lights, meaning Defendant did not simply hit buttons on the console at random, but had the presence of mind to consider all the buttons and turn off only the one controlling the blue lights. This is circumstantial evidence supporting Defendant's awareness of his present circumstances.

The cruiser video shows the car continuing to drive until another police cruiser is visible blocking the highway at the Richmond exit. At that point, Officer Shepard's cruiser is seen pulling over into the breakdown area and, after a few seconds, pulling back onto the highway going northbound again in the southbound passing lane. The car then accelerates dramatically, increasing speed as it passes multiple vehicles, including another police cruiser, reaching finally

over 100 mph and hitting the remains of Defendant's truck back at the scene of the original accident. All of this evidence, including evidence supporting his orientation to the moment, supports finding that Defendant's failure to perceive that driving at over 100 miles per hour into a crowded accident scene—one that he knew, having just driven away from the scene, was already littered with debris and crowded with people, at least one of whom Defendant had previously spoken to—involved a gross deviation from the standard of care that a reasonable person would have exercised in the same situation. See *Cameron*, 2016 VT 134, ¶¶ 8–10.

For the reasons explained in subpart 1, the evidence presented concerning the insanity defense does not preponderate heavily against the weight of the verdict finding Defendant guilty on this count.

Defendant's motion for a new trial pursuant to Rule 33 arguing that the verdict is against the weight of the evidence as to the count of grossly negligent operation is denied.

3: Aggravated Operation of a Vehicle Without the Owner's Consent

The count alleging aggravated operation of a vehicle without the owner's consent concerns the same factual situation. The elements of the offense are that (1) Defendant; (2) took and operated a motor vehicle that belonged to someone else, here, a Williston police cruiser belonging to the Williston Police Department; (3) that Defendant did not have the owner's consent; (4) that he acted knowingly; and (5) that the vehicle sustained $500 or more in damage during the commission of the offense. Jury Instructions at 19.

The evidence supporting the first element is the same as that noted above as to the crime of grossly negligent operation. Officer Shepard credibly identified Defendant as the driver ejected from his cruiser. The cruiser video shows Defendant running towards the cruiser, then the cruiser driving without any other operator entering until the video ends abruptly at the accident scene. This evidence is sufficient to establish the first element.

The evidence supporting the second element is the video footage showing Defendant, identified in the video by Officer Shepard, running toward the cruiser, along with the evidence of identity and operation noted *supra*. Officer Shepard testified that the vehicle in question was his cruiser, and that it was unique in that it had a flashing white light on its front bumper. Officers Claffy and Nadeau also testified as to this unique feature. The vehicle seen in Officer Claffy's cruiser video passing him while he's stopped on I-89 south of the accident scene has the flashing white front light. This evidence is sufficient to establish the second element.

The third element is established by Officer Shepard's credible testimony that he never gave Defendant consent to operate the cruiser.

The evidence establishing the fourth element includes the video footage showing that Defendant turned away from Officer Shepard as he ran past Defendant down the embankment, and that, once the officer was out of sight, Defendant made a sharp turn and ran straight toward the vehicle from which the officer had emerged. This behavior is circumstantial evidence of Defendant's knowledge that he did not have the officer's consent to take his cruiser, as he hid his face from the officer and only ran toward the vehicle once the officer was out of sight. Defendant was known to the Williston Police Department, as he had had previous contact with

law enforcement. Further evidence supporting that Defendant knew he was taking a vehicle that was not his and was doing so without consent is that the vehicle was a marked police cruiser with its blue lights activated. Defendant's presence of mind during the offense is additionally demonstrated by his ability to turn off the cruiser's blue lights without activating any of the other buttons on the crowded and complex control panel. The ability to do this indicates his awareness of what the control panel was, the function of its controls, and his ability to read the buttons and process their function. Finally, the fact that Defendant pulled over when he saw a police cruiser blocking I-89 near the Richmond exit, then turned around and drove at a high rate of speed in the opposite direction suggests flight, which is circumstantial evidence of knowledge of wrongdoing. *State v. Pelican*, 160 Vt. 536, 542 (1993) ("It is proper for the jury to consider flight evidence as it tends to show consciousness of guilt.").

As to the final element, it was stipulated by the parties that the damage to the vehicle totaled $59,053.26.

For the reasons explained in subpart 1, the evidence presented concerning the insanity defense does not preponderate heavily against the weight of the verdict finding Defendant guilty on this count.

Defendant's motion for a new trial pursuant to Rule 33 arguing that the verdict is against the weight of the evidence as to the count of aggravated operation of a vehicle without the owner's consent is denied.

B: Denial of Motion for Mistrial Based on State's Failure to Produce Evidence

Defendant next moves for a new trial based on the Court's denial of his motion for a mistrial on Monday, May 13, based on his counsels' discovery after the testimony of defense witness Anila Lawrence that Ms. Lawrence had given additional interviews to the State that defense counsel had not received. Defendant's motion is substantively identical to the motion raised and addressed during trial. The Court affirms and adopts its ruling made on the record during the trial. The testimony to which Defendant objected was struck from the record and a cautionary instruction was given. Further, the Court offered as a part of its ruling to allow Defendant to recall the witness, and Defendant did not do so. Defendant's motion pursuant to Rule 33 on this ground is denied.

C: Evidentiary Rulings

Defendant cites two errors in the admission of certain evidence that justify a new trial. First, Defendant argues that his objection to the State's reference to a non-witness defense consultant in questioning the expert witnesses Dr. Rosmarin, Dr. Kapoor, and Dr. Cotton should have been sustained. Second, Defendant argues that the State's use of its PowerPoint presentation in its closing argument requires a new trial.

1: Reference to Defense Consultant

Defendant argues that the Court's pre-trial ruling denying the State's motion to depose and obtain the interview notes of the unnamed defense consultant mentioned in the transcripts of defense investigator Jamie Lee Kiley's interviews with Defendant precluded the State from

questioning the expert forensic psychiatrists about this consultant. However, the Court's order ruling on that motion made no mention of whether the State could question any witnesses about the defense consultant.

Further, it is uncontroverted that the transcripts of Ms. Kiley's interviews were given to the experts and that they relied upon them in coming to their opinions as to Defendant's sanity. The existence of the defense consultant and his potential impact on the expert's assessment of Defendant's story were part of the factual basis underlying the experts' opinions and thus admissible under V.R.E. 703. While the scope of Rule 703 has been narrowed in recent years, including an amendment in 2004 to "provide[] a presumption against disclosure to the jury of information used as a basis of an expert's opinion and not admissible for any substantive purpose," this presumption only applies "when that information is offered by the proponent of the expert." Reporter's Notes—2004 Amendment, V.R.E. 703 (quotation marks omitted). "Nothing in this rule restricts the presentation of underlying expert facts or data when offered by an adverse party." *Id.* Thus, the State's questioning of the defense experts on this issue was not restricted by the amendment. The State's later questioning of Dr. Cotton on the matter would not be objectionable in light of these previous disclosures.

Considering the matter under V.R.E. 403, the evidence that Defendant had met with a forensic psychiatrist prior to his being evaluated by Dr. Cotton, and that this consultant may have played some role with Defendant's crafting of the narrative of his story for future interviews with forensic psychiatrists, is incredibly probative on the issue of the validity of the basis for the experts' opinions, all of which relied primarily upon Defendant's narrative. While the fact of the defense consultant's existence may be prejudicial to the defense, it is not unfairly so. Defendant himself shared with the experts the transcript of Ms. Kylie's interview disclosing the existence of the consultant. Further, any prejudice does not substantially outweigh the probative value of this evidence.

The Court denies Defendant's Rule 33 motion on this ground.

2: State's Closing Argument

Defendant objects to the State's use of a PowerPoint in its closing argument. Defendant did not raise an objection at the start of the State's closing argument, or during its rebuttal. Defendant made an objection at sidebar the following day on May 21, 2019, only as to the video clips of the witness testimony. The Court overruled the objection on the record, noting that the clips were the verbatim words the witnesses spoke during the trial and the visual image was recorded during the witnesses' testimony at trial. The Court found that it was not improper and was not prejudicial.

Defendant's post-trial motion expands the objection to encompass the use of the cruiser video—which was admitted into evidence—as a background to the State's argument and the State's reference to the names and ages of the decedents. Defendant cites V.R.E. 403 as the basis for his objections.

The Vermont Supreme Court has stated the relevant standard concerning prosecutorial misconduct in its closing argument as follows:

> [F]or the instances where the defense objected to improper comment and the trial court erroneously overruled defense counsel's objection, we apply a two-part harmless error test: was the closing argument improper and, if so, did it impair defendant's right to a fair trial? See *State v. Reynolds*, 2014 VT 16, ¶¶ 28, 32, 196 Vt. 113.... In considering the second prong of that test, we have looked to these "nonexclusive" factors:
>
> > the blatancy of the challenged statement, the impact on the theory of the defense, the persistence and frequency of the statement, the opportunity for the court to minimize potential prejudice, the strength of the evidence supporting the relevance of the statement, the overall strength of the State's case, the apparent motivation for making the remarks, and whether the statement was inflammatory and attacked defendant's character.
>
> *State v. Hemond*, 2005 VT 12, ¶ 12, 178 Vt. 470... (mem.) (citations omitted). In other words, "we weigh the statements in the context of the trial as a whole and not in isolation." *Reynolds*, 2014 VT 16, ¶ 28.... "Harmless error analysis requires the reviewing court to inquire if, absent the alleged error, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict regardless of the error." *State v. Hamlin*, 146 Vt. 97, 106... (1985). The burden is on the State to show that the error was harmless. *Chapman v. California*, 386 U.S. 18, 24... (1967).

State v. Webster, 2017 VT 98, ¶ 24, 206 Vt. 178, *reargument denied* (Nov. 17, 2017). Each error is considered individually, as "[u]nlike many other states, Vermont has not adopted the cumulative error doctrine for reviewing the impact of numerous errors that alone would be harmless but that, when considered together, undermine the fairness of a trial." *Id.* ¶ 25 n.3.

a: PowerPoint

Defendant raises two arguments with respect to the PowerPoint presentation used by the State in its closing. The Court finds that neither aspect was improper, and that neither impaired Defendant's right to a fair trial.

> As the New York Court of Appeals recently stated,
>
> > [t]here is no inherent problem with the use of a PowerPoint presentation as a visual aid in connection with closing arguments. Indeed, it can be an effective tool. But, the long-standing rules governing the bounds of proper conduct in summation apply equally to a PowerPoint presentation. In other words, if it would be improper to make a particular statement, it would likewise be improper to display it (*see People v. Anderson,* 29 N.Y.3d 69, 52 N.Y.S.3d 256, 74 N.E.3d 639 [2017] [decided today]). If counsel is going to superimpose commentary to images of trial exhibits, the annotations must, without question, accurately represent the trial evidence (*see e.g. People v. Santiago,* 22 N.Y.3d 740, 751, 986 N.Y.S.2d 375, 9 N.E.3d 870 [2014]). Moreover, any type of blatant appeal to the jury's emotions or egregious proclamation of a defendant's guilt would plainly be unacceptable (*see e.g. State v. Walker,* 182 Wash.2d 463, 341 P.3d 976 [2015]).

People v. Williams, 74 N.E.3d 649, 652 (N.Y. 2017) (affirming denial of defendant's motion for a new trial on this issue); *State v. Walker*, 341 P.3d 976, 984 (Wash. 2015) ("Attorneys may use multimedia resources in closing arguments to summarize and highlight relevant evidence, and good trial advocacy encourages creative use of such tools.").

The video clips depicting the witnesses' testimony included in the State's PowerPoint were taken from YouTube, but represent what the State proffered to be unaltered visual recordings of the testimony at trial. Defendant does not allege that these videos are not authentic video recordings of the witnesses' actual testimony at trial, or that the clips were augmented or enhanced in a prejudicial manner. The Court cannot find that these video clips do not accurately represent the trial evidence. The use of the videos was not improper. Further, the PowerPoint itself was not evidence, and was not submitted to the jury during their deliberations. The Court adopts and affirms its ruling made on the record and denies Defendant's Rule 33 motion on this ground.

Defendant argues that the video clip from the cruiser video, which was in evidence, represents a blatant appeal to the jury's emotions by displaying a "highly prejudicial, apocalyptic, fiery scene." Mot. at 25. It is uncontroverted that at multiple points during the trial, the jury was shown video clips depicting this scene from multiple vantages and heard testimony concerning the devastating nature of the accident scene both after the first accident and especially so after the second. The State's PowerPoint did not enhance the cruiser video with inflammatory headings or otherwise introduce statements not in evidence regarding the images in its PowerPoint, as was the case in both *Walker* and *Williams*. *Williams*, 74 N.E.3d at 652–53 ("Here, defendant argues that he was deprived of a fair trial by the annotation of images of the trial exhibits to imply that the victim's brother, in his testimony, had positively identified either his truck or defendant from the surveillance video because this misrepresented the witness's testimony. Significantly, the trial court was very attuned to the annotated slides and, in the exercise of its discretion, ultimately stopped the slideshow and instructed the jury to disregard the slides."); *Walker*, 341 P.3d at 985 ("The prosecution committed serious misconduct here in the portions of its PowerPoint presentation discussed above—it included multiple exhibits that were altered with inflammatory captions and superimposed text; it suggested to the jury that Walker should be convicted *because* he is a callous and greedy person who spent the robbery proceeds on video games and lobster; it plainly juxtaposed photographs of the victim with photographs of Walker and his family, some altered with racially inflammatory text; and it repeatedly and emphatically expressed a personal opinion on Walker's guilt.").

The Court does not find that the inclusion of this video in the State's closing PowerPoint was unduly prejudicial or served only to inflame the passions of the jury against the Defendant, or that any such prejudice substantially outweighed the probative value of the video. See V.R.E. 403. The Court also does not find that the playing of the video constituted the kind of blatant appeal to the jury's emotions that the courts found objectionable in *Williams* and *Walker*. It's use was not improper. The Court, therefore, denies Defendant's Rule 33 motion on this ground.

In further support for denying Defendant's motions concerning the PowerPoint, the jury instructions contained a specific explanation of what did and did not constitute an exhibit, including that certain "digital presentations" were demonstrative aids and were "not themselves evidence or proof of any facts." *Jury Instructions* at 5. The Instructions also stated that the

closing arguments of counsel were not evidence. *Id.* at 2. As the *Williams* court explained, "where there is a concern that it will not be clear to the jury that the annotated PowerPoint slides are not in evidence, or a substitute for the actual evidence, a specific jury instruction will serve to emphasize that such representations are merely argument by counsel." 74 N.E.3d at 653.

b: Use of Names and Ages of Decedents

Defendant alleges that the State made multiple references to the names and ages of the five decedents in its closing and that this was improper, as the evidence had no relevance to the central issue in the case and was solely intended to play to the jury's emotions. As noted by the Vermont Supreme Court,

> [t]he general rule is that counsel "should confine argument to the evidence of the case and inferences that can properly be drawn from it." *State v. Karov,* 170 Vt. 650, 653...(2000) (mem.) (quotation omitted). Counsel must avoid appealing to the prejudice of the jury, and should not "play on the jury's sympathy or seek to inflame their passions."

Reynolds, 2014 VT 16, ¶ 30.

Other courts have found that the repeated emphasis of the age of a victim can amount to improper conduct. For example, in *People v. LaPorte*, the N.Y. Appellate Division found improper the fact that the prosecutor repeatedly mentioned the robbery victim's "status as a veteran and his advanced age to try to make the jury feel guilty if it doubted [the victim's] identification of his assailant." 762 N.Y.S.2d 55, 57 (N.Y. App. Div. 2003). In *State v. Hightower*, the New Jersey Supreme Court found improper the prosecutor's statement at the end of his closing that the murder victim's birthday was that day and the age she would have turned: "The statement about the victim's age and birthday 'contain[ed] nothing that would aid the jury in determining the defendant's guilt or innocence.'" 577 A.2d 99, 115 (N.J. 1990). The court did not grant the defendant's motion for a new trial on this basis, however, because the prosecutor's conduct did not prevent the jury from fairly assessing defendant's case. *Id.*

The names and ages of the decedents in this case were in evidence; however, this information had little to no relevance to the facts at issue in the case, as the Court noted in its pre-trial ruling concerning the State's opening. Yet, even if the Court were to find that the State's mentioning of these facts was improper, it cannot be said that these statements impaired Defendant's right to a fair trial. The State did not repeatedly emphasize the decedents in its closing or rebuttal, and the mention of their names and ages was not blatant or inflammatory, nor did the State attack Defendant's character in mentioning their ages. Weighing the statements in the context of the trial as a whole and not in isolation, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict regardless of the error. Defendant's Rule 33 motion on this basis is denied.

D: New Evidence

Defendant contends that he is entitled to a new trial based on the State's dismissal of three other pending cases concerning other defendants charged with murder where insanity was raised as a defense. He argues that these dismissals indicate the State's reliance on the testimony

of Dr. Rosmarin and would have constituted invaluable rehabilitation evidence for Dr. Rosmarin and potential impeachment material for Dr. Cotton.

As the Vermont Supreme Court explained in *State v. Bruno*,

> "Motions for new trial on the ground of newly discovered evidence are not favored by the courts and are viewed with great caution; courts are properly reluctant to grant a second trial once a defendant has had his or her day in court and been fairly tried." *State v. Schreiner,* 2007 VT 138, ¶ 26, 183 Vt. 42, 944 A.2d 250. To succeed on a motion for a new trial based on newly discovered evidence, defendant must prove each of the following elements: (1) new evidence would probably change the result on retrial; (2) the evidence was discovered only subsequent to trial; (3) the evidence could not have been discovered earlier through the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching. *Id.*

2012 VT 79, ¶ 9, 192 Vt. 515. "The test is stringent, ... and all five elements must be satisfied for the trial court to grant a motion for new trial." *State v. Charbonneau*, 2011 VT 57, ¶ 16, 190 Vt. 81.

Defendant fails to demonstrate how the fact that the State relied on Dr. Rosmarin's assessment of another individual's sanity in dismissing a case would probably change the result in his case on a retrial given the state of the evidence as explained above. Defendant has failed to establish the first element. *Bruno*, 2012 VT 79, ¶ 10 (stating that in assessing the first element, "[d]efendant must show that the new evidence would 'likely lead to an acquittal of the defendant on retrial.'").

Defendant further fails to demonstrate how this evidence is not cumulative as to Dr. Rosmarin, as he testified at trial to having provided expert opinions in many cases for both defense counsel and the State in Vermont. Defendant also fails to demonstrate how this evidence is anything other than impeachment evidence as to Dr. Cotton, which is expressly not a basis for granting a new trial under Rule 33. *State v. Jackson*, 126 Vt. 250, 255 (1967) ("The petitioner claims the new evidence is competent to show the reputation and character of the witness. Evidence of bad reputation or character is one mode by which the credibility of a witness may be attacked. The only function of such evidence is impeachment. Thus, it is not ground for a new trial."). Thus, Defendant has also failed to establish the fifth element.

Defendant's motion pursuant to Rule 33 on this ground is denied.

E: Jury Instructions on Diminished Capacity

Defendant argues that the Court's placement of the diminished capacity instruction was erroneous, and that as a result of its placement, he was denied due process and is entitled to a new trial. Defendant raised an objection to the placement of the diminished capacity instruction during the charge conference and prior to the jury retiring.

The Court reviews objections to the jury instructions according to the following standard:

> viewing the instructions "in their entirety," [whether] they provided sufficient guidance to the jury without introducing prejudice into their deliberations. *State v. Martin,* 2007 VT 96, ¶ 39, 182 Vt. 377, 944 A.2d 867. The instructions need not be perfect; however, they must reflect "the true spirit of the law, such that the jury has not been misled." *Id.* (quotation omitted). A reversal is not called for unless the court's instructions, viewed in this light, "undermine[ ] confidence in the jury's verdict." *Id.*

State v. Viens, 2009 VT 64, ¶ 10, 186 Vt. 138.

Defendant's argument is insufficient to establish error under this standard. Defendant does not argue that the substance of the diminished capacity instruction was erroneous; he argues that it was not placed in the appropriate location in the instructions. However, the Vermont Supreme court has noted that "[i]f the jury charge as a whole breathes the true spirit and doctrine of the law, we will uphold it." *State v. Jones*, 2008 VT 67, ¶ 23, 184 Vt. 150. The instructions read in this case stated in the *mens rea* instruction for second-degree murder that the jurors "may also consider whether Mr. Bourgoin was operating under a diminished capacity when you consider if he possessed the required state of mind." *Jury Instructions* at 9. The instructions also stated that "[t]he concept of diminished capacity will be explained more fully below." *Id.* Defendant fails to establish how this instruction fails to breathe the true spirit and doctrine of the law, especially as he raises no claim of error as to the actual substantive instruction on diminished capacity. Further, Defendant fails to show how the placement of the substantive instruction undermines confidence in the verdict where the instructions explicitly mention the impact of diminished capacity on the *mens rea* element of second-degree murder, and that the complete definition of the term will be given later in the instructions and in fact was so given.

Defendant's Rule 33 motion for a new trial on this issue is denied.

F: Denial of Right to Unanimous Verdict

Defendant argues that he was denied the right to a unanimous verdict by twelve impartial jurors based on allegations heard third-hand that two jurors had contacted the judiciary after the trial seeking trauma counseling, and that one juror in an interview with the press stated that at the outset of deliberations, there had been one holdout juror and that the jury had been split at the start of deliberations.

Defendant is guaranteed the right to a unanimous verdict by twelve impartial jurors under the Vermont Constitution. *State v. Bellanger*, 2018 VT 13, ¶ 9, 206 Vt. 489 ("The Vermont Constitution requires that a criminal conviction will follow from only a unanimous verdict."); *State v. Abdi*, 2012 VT 4, ¶ 19, 191 Vt. 162 ("It is well settled, however, that a defendant is 'entitled to be tried by 12 ... impartial and unprejudiced jurors.'"). Defendant's allegations stated above fail to demonstrate that this right was violated.

The fact that the jury was split at the outset of deliberations, but ultimately came to a unanimous verdict does not indicate anything improper and is in fact the purpose of the deliberative process. As the U.S. Supreme Court stated in *Allen v. United States*:

> While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself.

164 U.S. 492, 501–02 (1896); *Smalls v. Batista*, 191 F.3d 272, 280 (2d Cir. 1999) ("The purpose of deliberations, after all, is to reach a unanimous verdict.").

Further, the interview cited by Defendant shows that the holdout juror changed their mind by the end of deliberations. See Alan J. Keays, *Juror in Bourgoin case says panel was split at start of deliberations*, VTDigger, May 23, 2019 ("There was one holdout juror in the Steven Bourgoin murder trial, but that person eventually agreed with the rest of the panel that found the former Williston man was sane when he drove his pickup truck the wrong way on the interstate and killed five central Vermont teens."), available at https://vtdigger.org/2019/05/23/juror-in-bourgoin-case-says-panel-was-split-at-start-of-deliberations/. Indeed, the jury was questioned at the time it delivered its verdict as to whether the verdict was unanimous, and all agreed that it was as to both guilt and as to the rejection of the insanity defense. Defendant declined individual polling of each juror.

This is distinguishable from cases where defendants have made sufficient allegations of juror misconduct indicating a violation of that right. The case cited by Defendant in his brief involved a juror's prejudicial personal knowledge of the defendant gained from overhearing a conversation in a bar, which she then shared with the other jurors. *People v. Nesler*, 941 P.2d 87, 99 (Cal. Ct. App. 1997). This is similar to the facts in *Abdi*, where a juror performed independent research on Somali culture, and then shared the results of that research with the other jurors during deliberations. 2012 VT 4, ¶ 10. There, the Vermont Supreme Court stated that "[c]onsideration by a jury of facts outside the evidence strikes at the heart" of defendant's fair trial rights. *Id.* ¶ 12.

Defendant has failed to allege, let alone adequately prove, that he was denied his right to a unanimous verdict by twelve impartial jurors. His Rule 33 motion for a new trial on this basis is denied.

G: Post-trial Meeting with Jurors

Finally, in a previously-sealed motion filed separately, Defendant moves for a new trial pursuant to V.R.Cr.P. 33 based on the post-trial "debriefing" this Court conducted with the jurors on May 22, 2019, after Defendant's trial concluded and a verdict of guilty on all counts was entered. Defendant claims that the Court's conducting of this post-trial meeting constitutes an *ex parte* communication and renders this Judge partial in the matter in violation of the Vermont

Code of Judicial Conduct, which serves to bar this Court from considering Defendant's post-trial motions. Defendant also claims that this meeting violated his rights under the Fifth, Sixth, and Fourteenth Amendments to an impartial judge at all phases of his criminal case, to be present at all stages of a criminal proceeding, and to have all evidence against him developed in a public courtroom. Defendant claims that the only remedy available is a new trial, as these flaws undermine the due process protections of a fair trial, representing a structural defect in the trial, which mandates a presumption of prejudice.

Defendant does not seek recusal or disqualification of the Court. Mot. at 6, 18; see, e.g., *White v. Yellow Freight Sys., Inc.*, 905 So. 2d 506, 515 (Miss. 2004) (finding no basis for recusal as a result of post-trial *ex parte* communications with jurors which revealed juror error, given high bar for overcoming presumption of impartiality, the judge's emphatic statement that he cannot and did not consider any information gained outside of the trial, and "[t]he fact that the trial judge reported the *ex parte* communications and did not reference them in his order granting the motion for new trial is further evidence that the trial judge maintained his impartiality and limited his decision to the admissible evidence."); see also *State v. Davis*, 165 Vt. 240, 249 (1996) ("We presume the integrity and honesty of judges, and the moving party has the burden to show otherwise.").[3] The Court does not itself find any basis for recusal pursuant to Canon 3(E)(1)(a).

Defendant argues that recusal is not an adequate remedy because no other judge can rule on Defendant's post-trial motions. Sealed Mot. at 6. For this reason, he argues, he is entitled to a new trial. Defendant cites no authority for his contention that no other judge can rule on his post-trial motions, and that he thus is entitled to a new trial. The Court finds that there are several flaws in the logic of this argument.

First, the argument assumes that recusal is warranted. However, as set forth above, no motion to recuse has been filed, nor does this Court find any basis for its recusal. Barring the recusal of this Court, the Court is obligated to rule on Defendant's post-trial motions. See *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Memorandum of Rehnquist, J.) ("Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified."). To the extent Defendant's concern is that the Court has heard inadmissible evidence in the post-trial meeting, the presumption is that the Court is able to put such inadmissible evidence aside in ruling on Defendant's post-trial motions. See *Harris v. Rivera*, 454 U.S. 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions."); *State v. Davis*, 165 Vt. 240, 249 (1996) ("The trial judge's exposure to defendant's privileged statements does not justify recusal from sentencing. *State v. Dupree,* 151 Vt. 644, 644, 559 A.2d 693, 693 (1989) (mem.) (we tolerate exposure to inadmissible evidence by judges in bench trials where we would not tolerate exposure to same evidence by jury)."). The Court did not consider any information gained in the post-trial meeting with jurors in ruling on Defendant's post-trial motions.

[3] This Court cannot rule on any motion to recuse should one be filed. V.R.C.P. 40(e).

Second, the contention that post-trial motions must be decided by the judge who sat on the trial or a new trial is automatically warranted is patently false. Rule 25 provides for this exact circumstance and does not automatically award the parties a new trial:

> If by reason of death, sickness, or other disability or unavailability, the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict of guilty, then a Supreme Court Justice or a Superior Judge designated by the Administrative Judge may perform those duties; but if such other judge designated is satisfied that he or she cannot perform those duties because he or she did not preside at the trial, or for any other reason, he or she may in his or her discretion grant a new trial.

V.R.Cr.P. 25. The Vermont Supreme Court has stated that "it may be problematic for a substitute judge to act on a motion for a new trial if the evidence at the trial was conflicting or if the credibility of the witnesses was an important issue." *State v. Fuller*, 144 Vt. 485, 488 (1984) (citing 2 C. Wright, Federal Practice & Procedure § 393 (1982)). Yet, other courts have noted that the circumstances under which a substitute judge would be unable to so act are extremely limited. See, e.g., *State v. Ellis*, 453 S.W.3d 889, 907–08 (Tenn. 2015) (noting that the only aspect of credibility which is not readily apparent in the record is the witness's demeanor and that "the argument that a successor judge is unable to rule as the thirteenth juror presumes that the witnesses' demeanor on the stand was so significant *in and of itself* as to raise a concern that the jury's verdict was a 'miscarriage of justice,'" holding that "a successor judge should indulge a rebuttable presumption that she is able to act as the thirteenth juror in a criminal case after thoroughly reviewing the entire record of the trial.") (cited in 6 Crim. Proc. § 22.4(e) (4th ed.)). Even acknowledging this limitation, the Vermont Court emphasized that the ultimate decision was within the discretion of the substitute judge. *Fuller*, 14 Vt. at 488. Thus, even were Defendant to move for recusal, and the reviewing judge determined that recusal was appropriate, it would be up to the substitute judge to decide, within their discretion, whether a new trial was warranted. Therefore, this argument does not provide a basis, in and of itself, for granting Defendant's Rule 33 motion for a new trial.

Finally, even assuming the violations of the Judicial Code[4] and federal and Vermont constitutions argued by Defendant, the appropriate remedy would not be a new trial. The cases

---

[4] The Court notes that the facts as stated by Defendant do not necessarily constitute violations of the Judicial Code as he claims. Defendant alleges that the meeting violated Canon 3(B)(10), which states that "[a] judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community." A.O. 10, Vermont Code of Judicial Conduct, Canon (3)(B)(10). Defendant, however, fails to allege that the Court commended or criticized the jurors for their verdict at this meeting. There is thus no allegation of a violation of this canon.

Though not specifically cited, Defendant appears to further allege that the meeting violated Canon 2(A), which mandates that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," 3(B)(5), which requires that "[a] judge shall perform judicial duties without bias or prejudice," 3(E)(1), which requires that a judge recuse himself from a proceeding "in which the judge's impartiality might reasonably be questioned," and 3(B)(7), which mandates that a judge "not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." *Id.*

cited by Defendant—while supporting the contention that such post-trial meetings are frowned upon in some jurisdictions and open the door to the discovery of jury misconduct—do not

---

Defendant cites no evidence supporting the contention that this Court is biased or prejudiced against either party as a result of this post-trial meeting. Indeed, at the meeting with counsel, the Court relayed the *jurors'* general impressions of the trial processes, witnesses, and counsel as disclosed during a meeting which concerned primarily the operations of the court and the treatment of jurors. The trial judge relies on their own impressions of the evidence in deciding post-trial motions. See *State v. Ladabouche*, 146 Vt. 279, 283–85 (1985) (discussing the role of the trial judge in ruling on Rule 29 and 33 motions and stating that the trial court must weigh the evidence on its own according to the standards under each rule). The Court emphatically denies any bias or prejudice in this matter, either in general or as a result of this meeting. Defendant has further failed to show how this Court's impartiality could reasonably be questioned based on this meeting. See *Harris v. United States*, 738 A.2d 269, 280 n.19 (D.C. 1999) (finding no violation of Canon 3(c)(1) concerning the appearance of partiality where judge, after post-trial meeting resulted in inadvertent disclosure of juror misconduct, emphatically denied influence or partiality, where information conveyed by jurors was already known to the judge, and judge informed parties of conversations and gave defendant opportunity to present case for recusal). Defendant has thus failed to allege a violation of Canons 2(A), 3(B)(5), or 3(E)(1).

Nor does Defendant argue or present evidence supporting the allegation that this meeting with the jurors fails to "promote[] public confidence in the integrity and impartiality of the judiciary." A.O. 10, Judicial Code, Canon 2(A). Compare the instant situation with that in *In re Mandeville*, cited by Defendant, Mot. at 7, in which a trial judge gave an interview with a newspaper in which he was quoted as having stated that "A plea of guilty shows that the defendant has some kind of repentance for what he did that would not hold true in a trial. In that case he would not be dealt with as leniently." 144 Vt. 608, 609 (1984). There, the Supreme Court found that

> [a]ny pronouncement relative to the right to trial by jury as made by this judge may have a chilling effect on that constitutionally protected right. Such effect is an impairment of that right. Such impairment results in conduct of a manner that fails to promote public confidence in the integrity and impartiality of the judiciary is contravention of Canon 2 A.

Id. Here, the Court held the meeting with the jurors precisely to promote public confidence in the integrity of the judiciary by demonstrating its interest in the experience of the jurors as jurors within the system.

As to the canon barring *ex parte* communications, it is not clear that a post-trial debriefing between the Court and the jury, after they have been discharged, constitutes an *ex parte* communication within the meaning of the Code. Compare *Harris*, 738 A.2d at 278 ("Accordingly, while it is clear from the record that Judge Dixon did not intend to elicit substantive comments about the jury's deliberations and, indeed, cautioned the jury that it would be inappropriate for him to address some of their concerns, we are constrained to conclude that, despite his good intentions, the judge inadvertently initiated and subsequently engaged in prohibited *ex parte* communications about Harris' pending case during his post-verdict meeting with the jurors, thereby violating Canon 3(A)(4).") with *State v. Richey*, 2015 WI App 37, ¶ 41, 363 Wis. 2d 656, 862 N.W.2d 904 ("While the circuit court's meeting with the jurors might constitute plain error if it qualified as a prohibited ex parte communication, we agree with the State that it did not."). This is especially so where, as here, and distinguishing the instant situation from *Harris*, the Court (1) did not inquire of jurors as to any of the reported matters, and (2) the Court did not receive any evidence of wrongdoing on the part of jurors that raises questions concerning the validity of the verdict that would warrant further investigation or review, such that the Court itself might become a witness in the proceedings. Indeed, the observations shared with all counsel present were consistent with the post-verdict media reports, as well as Defense counsel's post-verdict interviews with several jurors. The meeting is certainly distinguishable from the types of communications considered in *Gokey*, which included the judge independently contacting a pharmacist for information on the effects of certain medications taken by the defendant, and her *in camera* interview of the transport officers as to their observations of the defendant as a part of her ruling on a motion questioning the defendant's competency during his trial. 2010 VT 89, ¶ 8; cf. *Vannucci v. Memphis Obstetrics & Gynecological Ass'n, P.C.*, No. W2005-00725-COA-R3CV, 2006 WL 1896379, at *9 (Tenn. Ct. App. July 11, 2006) (denying interlocutory appeal by non-settling defendants seeking to recuse judge who approved settlement in part because in approving settlement, judge engaged in *ex parte* communications with the settling parties and minor plaintiff).

support the notion that the holding of such meetings in itself justifies his receiving a new trial. Indeed, *ex parte* communications between the jury and the judge during trial as a matter of law do not automatically constitute reversible error. As the U.S. Supreme Court held in *Rushen v. Spain*:

> Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant. "At the same time and without detracting from the fundamental importance of [these rights], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving [such constitutional] deprivations are [therefore] subject to the general rule that remedies should be tailored to the injury suffered ... and should not unnecessarily infringe on competing interests." *United States v. Morrison,* 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981); see also *Rogers v. United States,* 422 U.S. 35, 38–40, 95 S.Ct. 2091, 2094–2095, 45 L.Ed.2d 1 (1975). In this spirit, we have previously noted that the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation ... [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982). There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. The lower federal courts' conclusion that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice.
>
> This is not to say that *ex parte* communications between judge and juror are never of serious concern or that a federal court on habeas may never overturn a conviction for prejudice resulting from such communications. When an *ex parte* communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties. The prejudicial effect of a failure to do so, however, can normally be determined by a post-trial hearing. The adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred.

464 U.S. 114, 117–20 (1983) (footnotes omitted).

As noted by Defendant in his brief, the meeting itself was of a kind commonly held between trial judges and juries after they have been dismissed from their service as jurors. See, e.g., *State v. Badgett*, 644 S.E.2d 206, 218 (N.C. 2007) ("We conclude that the trial court did not err in thanking the members of the jury for their service, as the jury's service was complete at the time the trial judge thanked and discharged the jury outside of defendant's presence."); *Nationwide Mut. Fire Ins. Co. v. Tucker*, 608 So. 2d 85, 86 (Fla. Dist. Ct. App. 1992) ("We recognize that from time to time a trial judge may conduct an informal conference with a jury after the jury has been discharged. These conferences are held with the hope of developing a better understanding of those factors which may play a part in the actions of the jury and to help make the juror's service less burdensome and more enjoyable."); A.B.A., Model Code of Judicial

Conduct, Canon 2, Rule 2.8, cmt. 3 ("A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case."), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_8decorumdemeanorandcommunicationwithjurors/commentonrule2_8/. Though some states have barred or otherwise expressed disfavor towards such meetings, see *infra*, the Vermont Supreme Court has not considered the legitimacy of post-trial meetings between judges and jurors in themselves.

The most relevant Vermont cases cited by Defendant considered situations in which the court held hearings as to the validity of the verdict, during which jurors were questioned under oath and on the record as to their deliberations, and/or affidavits concerning the same were submitted. *State v. Abdi*, 2012 VT 4, ¶¶ 1, 12–17, 24, 191 Vt. 162 (reversing trial court's denial of motion for a new trial where court learned post-trial of alleged juror misconduct, held a hearing, and questioned the jurors concerning their deliberations, which "explicit inquiry here into whether the information influenced each juror's verdict plainly exceeded the limitations of its authority under [Vermont Rule of Evidence] 606(b). However worthy the motive, a court may not delve into how jurors arrived at their verdict, but must confine its inquiry to the objective events surrounding the alleged receipt of outside evidence."); *State v. Hudson*, 163 Vt. 316, 324 (1995) ("The court properly refused to consider statements by the jurors as to what may have influenced their deliberations."; citing V.R.E. 606(b)); *State v. Forte*, 159 Vt. 550, 561 (1993) (reversing superior court's granting of motion for extraordinary relief, where superior court held a hearing and interrogated jurors, stating "we seriously question the interrogation of the jurors on their reaction to the evidence and court proceedings they observed" and held on remand no further evidence could be taken from them); *Bellows Falls Vill. Corp. v. State Highway Bd.*, 123 Vt. 408, 412 (1963) ("However worthy its motives, when the trial court delved into the mental processes of the jurors in this case, to search out how their verdict was composed, the protection was invaded. In this aspect of its investigation, the court exceeded the limits of its authority."). [5]

[5] As concerns Defendant's argument, these cases addressed Vermont Rule of Evidence 606(b), which states that

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in conjunction therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, (3) whether there was a mistake in entering the verdict onto the verdict form, or (4) whether any juror discussed matters pertaining to the trial with persons other than fellow jurors. A juror's affidavit or evidence of any statement made by the juror may not be received on a matter about which the juror would be precluded from testifying.

V.R.E. 606(b). Defendant does not allege that a formal inquiry into the validity of the verdict was held in this case, nor that any juror gave "testimony," defined as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition," Testimony, Black's Law Dictionary (11th ed. 2019), in the informal meeting held by the Court such that this rule would apply and the cited precedent be applicable to the analysis.

These situations are distinguishable from the informal post-trial meeting held between this Court and the jurors, as Defendant does not allege that any juror raised any concern as to juror misconduct or external influence which might otherwise support further investigation by this Court or the parties into error in the verdict. Cf. *Abdi*, 2012 VT 4, ¶ 10 (post-verdict hearing on potential juror misconduct revealed external influence in the form of juror doing independent research "about the Somalian culture and their religion and bible and all" that was shared with the panel); *Harris*, 738 A.2d at 276–77 & n.11 (judge, during post-trial informal meeting with jurors, informed of juror who nullified possibility of conviction on first-degree murder at outset of deliberations, resulting in second-degree murder conviction despite evidence supporting first-degree charge); *Nationwide Mut.*, 608 So. 2d at 87–88 (quashing order granting motion for hearing to interview jurors for misconduct where two juror's responses to post-trial questionnaires sent by the court raised question that they had decided the case prior to hearing all the evidence; however, the record failed to clearly establish that the two jurors committed misconduct by not following the court's instructions, and "even assuming that the questionnaires established misconduct, as found by the trial court, and an interview would not have to delve into matters inherent in the verdict to make that determination, the misconduct itself would not entitle Mr. Tucker to another interview"); see also *Rushen*, 464 U.S. at 139 n.19 (Marshall, J., dissenting) (disagreeing with the majority's confluence of all *ex parte* meetings between the court and a juror as being germane to trials, noting that "[a]t issue here is a pair of *ex parte* meetings between a trial judge and a juror in which the juror revealed to the judge facts that impinged significantly upon the juror's impartiality—*i.e.*, that bore upon the juror's ability fairly to assess the defendant's guilt or innocence"). Defendant raises no issue with the trial or verdict itself based on this post-trial meeting.[6] The only matter presented in Defendant's sealed motion is whether the post-verdict meeting rendered the Court impartial or otherwise impacts post-trial proceedings to the extent that a new trial is warranted.

Yet even assuming that the meeting alone constituted error, this would not provide a basis for Defendant's Rule 33 motion because, as the *Harris* court stated in dicta discussing an alternative rationale for its decision, "if the judge is recused as a result of the post-trial conversation with the jurors, **only a resentencing, not a retrial, is involved**." 738 A.2d at 280 n.20 (internal quotation marks omitted) (emphasis added). Indeed, even the Supreme Court of New Jersey, which has imposed an express ban on all post-trial *ex parte* meetings between judges and juries, see *Davis v. Husain*, 106 A.3d 438, 447 (N.J. 2014), does not require reversal of a judgment when one occurs:

> A judge's improper ex parte interactions with a jury "does not automatically require" the reversal of a jury's verdict. *State v. Morgan*, 217 N.J. 1, 12, 84 A.3d 251 (2013) (quoting *State v. Brown*, 275 N.J. Super. 329, 332, 646 A.2d 440 (App.

[6] Before a court will entertain a motion to overturn the verdict based on juror misconduct or extraneous influence on the deliberations, the defendant is obligated to make a showing that such relief is warranted. "A defendant alleging either extraneous influences or juror misconduct must first demonstrate that an irregularity occurred and it had the capacity to affect the jury's result." *State v. McKeen*, 165 Vt. 469, 472 (1996). "Essentially the defendant must show that the jury was exposed to extraneous information relevant to an issue capable of affecting the verdict. ... Once this is shown, the State must demonstrate 'that the irregularity did not in fact prejudice the jurors against defendant.'" *Abdi*, 2012 VT 4, ¶ 13.

Div. 1994)). Writing for the Court in *Morgan*, Chief Justice Rabner reaffirmed the three-part test for evaluating a judge's inappropriate communications with a jury:

> (1) if the record affirmatively reveals that the defendant was prejudiced, reversal is required; (2) if the record does not show whether the ex parte contact was prejudicial, prejudice is presumed; and (3) if the record affirmatively discloses "that the communication had no tendency to influence the verdict," the outcome should not be disturbed.

[Ibid. (quoting *State v. Auld*, 2 N.J. 426, 432, 67 A.2d 175 (1949)).]

State v. J.T., 188 A.3d 1058, 1077 (N.J. Super. App. Div. 2018). Thus, even if the Court were to apply New Jersey's strict standard, the record affirmatively discloses that the communication between the Court and the jury—which occurred after the verdict was read and accepted by the Court, and the jury discharged—had no tendency to influence the verdict, and thus the outcome should not be disturbed.

Further, even if the Court assumes, as Defendant contends, Mot. at 15, that the meeting has rendered this Court a witness in the proceeding in violation of Rule 605, the remedy would not be a new trial. In *Gokey*, the Vermont Supreme Court held that, "guided by the fundamental principle of equality before the law, we hold that when a judge acts in violation of V.R.E. 605, we require no further showing of prejudice toward the injured party and will reverse the court's tainted ruling." 2010 VT 89, ¶ 20. There, the court had conducted *ex parte* interviews of witnesses on the issue of the defendant's competency during the trial, and as a result, the verdict rendered in that trial was reversed. *Id.* ¶ 21. In this matter, any taint from the post-trial meeting would affect only the instant motions and potentially Defendant's sentencing. As the meeting occurred after the verdict had been accepted and the jury discharged, the verdict and trial itself was not affected, and reversal is not required under *Gokey*.

As to Defendant's rights under the Sixth Amendment to confront witnesses against him and to be represented by counsel, Defendant fails to point to any "evidence" relevant to any post-trial motions that was developed outside of the trial. Defendant alleges only that the Court has heard the juror's assessment of the evidence presented at trial, that some jurors cried during this meeting and expressed a desire for "compassion" in his sentencing, and that the Court stated that, in hearing the jury's statements, that they "thought through everything very carefully" in rendering their verdict. Mot. at 2–5. These allegations fail to establish that the Court has heard "facts" or "evidence" relevant to its assessment of Defendant's post-trial motions as a result of its meeting with the jurors without the presence of Defendant or counsel. Indeed, *Abdi* is entirely distinguishable, as there, the Sixth Amendment issue concerned the jury's consideration during deliberations of information independently researched by a juror on the Internet, and not admitted at trial. 2012 VT 4, ¶¶ 12, 19–23. Thus, Defendant's Sixth Amendment rights to the confrontation of witnesses and representation by counsel are not implicated by the Court's post-trial meeting.

There is also no clear violation of his Fifth and Sixth Amendment right to be present which would require reversal. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) ("The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth

Amendment, *e.g., Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.). "In *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed. 853 (1919), the Court observed 'that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.' Id., at 81, 39 S.Ct., at 436." *Rogers v. United States*, 422 U.S. 35, 38 (1975). Here, the jury had been discharged after rendering verdict, and thus Defendant had no Sixth Amendment right to be present. See *Lettley v. Walsh*, No. 01-CV-5812NGGLB, 2007 WL 4590019, at *8 (E.D.N.Y. Dec. 20, 2007), *report and recommendation adopted,* No. 01-CV-5812(NGG)(LB), 2008 WL 3925318 (E.D.N.Y. Aug. 26, 2008) (finding no violation of defendant's Sixth Amendment right to be present where defendant was removed from the courtroom for lunging at prosecutor where "the court had already polled the jury and accepted the verdict, so petitioner's absence was of little consequence.").

Further, even prior to the verdict being rendered, "[t]he right to be present at every stage of trial does not confer upon the defendant the right to be present at every conference at which a matter pertinent to the case is discussed, or even at every conference with the trial judge at which a matter relative to the case is discussed." *United States v. Vasquez*, 732 F.2d 846, 848 (11th Cir. 1984); see *Rushen*, 464 U.S. at 125–26 (Stevens, J., concurring) ("I think it quite clear that the mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication."); *Polizzi v. United States*, 550 F.2d 1133, 1138 (9th Cir. 1976) (finding no reversible error in judge's post-verdict interrogation of jurors, stating that the "[U.S. Supreme] Court has said that the existence of a right to be present depends upon a conclusion that absence could, under some set of circumstances, be harmful. Due process does not assure 'the privilege of presence when presence would be useless, or the benefit but a shadow.'").

"Moreover, even improper exclusion of a defendant from a 'critical' portion of the trial does not automatically require reversal, if in the particular case the defendant's absence was harmless beyond a reasonable doubt." *Polizzi*, 550 F.2d at 1138 (citing *Rogers*). Certainly, here, Defendant's absence was harmless beyond a reasonable doubt as the trial was over, the verdict given, the judgment entered, and the jury excused prior to the meeting's commencement.

The cases cited by Defendant require no other result. *People v. Mason* concerned the defendant's absence from the read-back of jury instructions prior to the verdict being rendered, "which has been held to be a material stage of the trial." 764 N.Y.S.2d 80, (N.Y. App. Div. 2003) (citing *People v Ciaccio,* 47 N.Y.2d 431, 436–37 (1979)). *Diaz v. United States* concerned the defendant's voluntary absence from portions of the trial itself, including the examination of witnesses. 223 U.S. 442, 453–59 (1912).

As concerns this right under the Fifth Amendment, in *Gagnon*, the U.S. Supreme Court explained that "a defendant has a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend

against the charge.... [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" 470 U.S. at 526 (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105–06 (1934)). The Court found no Fifth Amendment violation in the defendant not being present at an *in camera* meeting between the judge, defense counsel, and a juror during the trial where the juror expressed concern over the defendant's sketching him, noting that "[t]he Fifth Amendment does not require that all the parties be present when the judge inquires into such a minor occurrence." *Id.* at 527.

As Defendant's opportunity to defend against the charge had been fully exercised prior to the Court's post-trial meeting with the jury, the Court sees no possible basis for finding a violation of Defendant's due process rights in the meeting's occurrence without his being present. Even if the holding of this meeting without Defendant or his counsel was a violation, Defendant has failed to show that this amounted to more than harmless error. Defendant has thus failed to state a basis for his Rule 33 motion for a new trial as a result of his constitutional right to be present at the proceedings against him under either the Fifth or Sixth Amendment.

Finally, as to the issue of Defendant's right to be tried by an impartial tribunal in accordance with the Fifth and Fourteenth Amendments, Defendant has failed to allege any evidence of partiality on the part of this Court and has not moved for its recusal. As noted above, the Court finds no basis for recusing itself under Canon 3(E)(1), and can be fair and impartial with respect to Defendant's post-trial motions and sentencing. Further, the cases cited by Defendant in support of his argument are readily distinguishable.

In re Murchison concerned charges of criminal contempt brought against two police officers for alleged perjury. 349 U.S. 133, 134–35 (1955). The perjury was found by a judge who had acted as his own "one-man grand jury" in calling the defendants into private meetings, wherein the judge questioned them individually, and then, based on the meetings, ordered that the defendants show cause as to why they should not be held in contempt for the answers they gave in those meetings, which that same judge found to constitute perjury based on other undisclosed evidence he had gathered. *Id.* The judge then presided over the show cause hearings and held both defendants in criminal contempt based on this evidence that the judge developed himself. *Id.* The U.S. Supreme Court reversed, stating that "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Id.* at 137.

Here, the Court did not investigate any evidence about Defendant, nor is the Court adjudicating Defendant's guilt based on its own investigations. Defendant's guilt was decided at a jury trial based on evidence developed independent of this Court. To the extent the information inadvertently shared by the jurors after they rendered their verdict and were excused from service bears on any matter before the Court, the Court will ignore that information in coming to its ruling, as it is presumed to so do. See *Harris*, 454 U.S. at 346.

In *Sullivan v. Louisiana*, the Court concluded that where a jury received an improper reasonable doubt instruction, the verdict must be reversed and harmless error analysis is inappropriate. 508 U.S. 275, 279–82 (1993). The Court listed other cases where reversal is required, such as where the judge is biased, *id.* at 279, citing *Tumey v. State of Ohio*, 273 U.S. 510 (1927). In *Tumey*, the Court held that trial by a judge who directly benefits financially from

the conviction of the defendant required reversal, noting that "[a] situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Id.* at 534. Here, Defendant's sealed motion raises no issue with the reasonable doubt instruction given to the jury, nor does it allege that this Court was biased at any point during the trial—indeed, he raises no argument concerning error as to any aspect of the trial or verdict itself based on this post-trial meeting—which might mandate reversal.

In *United States v. Blanchard*, the relevant portion of the decision concerned the trial court's *sua sponte* amendment of the information. 495 F.2d 1329, 1332 (1st Cir. 1974). The circuit court noted that though this was not prohibited by the relevant rule of procedure, neither was it sanctioned, as the amendment of informations is primarily the responsibility of the government. *Id.* at 1332–33. However, the court, "despite [its] general disfavor with judicial amendments," did "not believe it appropriate or sensible under these facts to reverse the judgment below on this basis." *Id.* at 1333 ("At least, where, as in the instant case, the amendment was truly one of mere technical form, and the defendants were neither prejudiced at trial, nor impaired in their defense, we will not disturb what we believe to be a fairly rendered jury verdict."). Therefore, the case does not support Defendant's contention that he is entitled to a new trial based on his alleged suspicions of partiality.

In *State v. Ovitt*, the Vermont Supreme Court reversed the defendant's convictions based on "the combined effect of the errors and irregularities" at his trial, including the court's improper instruction to the jury that it was going to be engaged in "law enforcement" and that the court officers bought the jury alcoholic beverages at the lunch breaks during the trial. 126 Vt. 320, 328 (1967). Defendant alleges no irregularities in the trial itself in his sealed motion.

In *State v. Abdi*, the Court was concerned that the external information researched by a juror and brought into the deliberations had an impact on the verdict, and therefore reversed and remanded for a new trial. 2012 VT 4, ¶ 23. Here, there is no allegation or evidence of impropriety or external influence of the jury, or any support for questioning the validity of the verdict based on the Court's post-trial meeting with the jurors.

Defendant cites several portions of the Vermont Constitution, including Chapter I, Article 10; Chapter II, Section 28; and Chapter I, Article 4. As the Vermont Supreme Court has noted, "[w]e have sometimes found Article 10 of the Vermont Constitution to provide similar protections as those provided by the federal Due Process Clause," and "[a]t other times, we have granted greater or different protections under Article 10." *State v. King*, 2016 VT 131, ¶ 35, 204 Vt. 228; *State v. Dean*, 148 Vt. 510, 515 (1987), *abrogated on other grounds by Betterman v. Montana*, 136 S. Ct. 1609, 194 L. Ed. 2d 723 (2016) (discussing speedy trial rights under these provisions and stating that Vermont Supreme Court "decisions have generally found, without extensive analysis, that the rights of defendants in this area are the same under the Vermont Constitution as under the federal constitution."). Defendant has failed to articulate how Article 10 or Chapter II, § 28 provide for greater or different protections with respect to his arguments than those under federal due process jurisprudence. "Defendant bears the burden of providing an explanation of how or why the Vermont Constitution provides greater protection than the federal constitution." *State v. Zumbo*, 157 Vt. 589, 592 (1991). As he has failed to meet his burden on this issue, the Court does not address it.

As for his reference to Article 4, the Vermont Supreme Court has characterized Article 4 "as the Vermont equivalent of the federal constitution's Due Process Clause," and has interpreted it "as requiring adequate access to judicial process." *Nelson v. Town of Johnsbury Selectboard*, 2015 VT 5, ¶ 53, 198 Vt. 277 (citations and certain quotation marks omitted). *Nelson* concerned a town manager who sought to challenge his dismissal on due process grounds; the Court reversed the trial court's granting of the town's summary judgment motion, and remanded the matter "to the trial court to decide if the selectboard furnished plaintiff with adequate notice and hearing upon termination." *Id.* ¶ 54. Defendant fails to articulate how his right of access to the courts has been infringed.

For all of the reasons stated herein, none of the arguments made in Defendant's sealed motion concerning the Court's post-trial meeting with the jurors provide a basis for granting his motion for a new trial. Defendant's Rule 33 motion for a new trial based on this Court's post-trial meeting with the jurors is denied.

C: Defendant's Motion to File Under Seal

Defendant filed one of his motions pursuant to Rule 33 under seal, as noted above. The Court unseals that motion contemporaneously with the issuance of this decision.

The newly-amended Vermont Rules of Public Access to Court Records ("PACR") Rule 9 governs the sealing of otherwise public case records, which the motion filed under seal clearly is. See PACR Rule 2(d) & 6(a). Normally, pursuant to the rule, the Court "must schedule a hearing for as soon as practicable but no later than 14 days after the filing of a motion notwithstanding other general rules of procedure" on the motion to seal. PACR Rule 9(a)(3). However, Defendant did not seek the sealing of his motion papers unilaterally in his motion to seal; rather, he left the decision of whether to seal within the discretion of the Court. Therefore, the Court understands Defendant's motion to seal as not a request to seal, but as a request for the Court to determine whether sealing is in fact required due to the nature of the information contained therein.

Though the Court acknowledges that portions of the motion refer to content which is generally prohibited from disclosure under V.R.E. 606(b)[7] and the policies on which it relies, see Reporter's Notes, V.R.E. 606, the Court does not find that sealing is appropriate in this instance. Defendant's motion does not disclose the identity of any juror or any information particular to an individual juror or their thoughts during deliberations. In addition, the information contained in Defendant's motion is not significantly different from information that has already been disclosed to the media concerning the juror's deliberations. See, e.g., Keays, *supra*. Further, there is no pending proceeding in this case which could be adversely influenced by the revelation of this information. Thus, the Court can discern no basis for finding by clear and convincing evidence, as it must to order the sealing of an otherwise public case record, "that good cause and exceptional circumstances establish that the grounds asserted for restriction of access or the

[7] V.R.E. 606(b) prohibits a juror to testify concerning "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in conjunction therewith."

sealing of record(s) overcomes the presumption of openness of court records, in accordance with applicable constitutional, common law, or statutory authority." PACR Rule 9(a)(4).

Defendant's motion to file under seal is denied.

III: Order

Defendant's motions for a judgment of acquittal pursuant to V.R.Cr.P. 29 are *denied.*

Defendant's motions for a new trial pursuant to V.R.Cr.P. 33 are *denied.*

Defendant's motion for a new trial filed under seal will be unsealed and included in the case file.

SO ORDERED in Burlington, Vermont this 3d day of August, 2019.

Hon. Kevin W. Griffin
Superior Court Judge